Editor's note: Appealed -- aff'd, Civ.No. 86-C-741B (N.D.Okl. April 7, 1988)

TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-529 Decided July 14, 1986

Appeal from a decision of Administrative Law Judge Miller, affirming the issuance of notice of violation 84-03-108-13.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

   Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 1271(b) of SMCRA.

2. Surface Mining Control and Reclamation Act of 1977: Permits: Modifications -- Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, an operator's failure to obtain written documentation of permit changes from a State regulatory agency exposes a permittee to potential liability under the Act.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation of 1977: Hearings: Generally

   OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is unrebutted, the violation will be sustained on appeal.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant; Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Turner Brothers, Inc. (Turner) has appealed the decision of Administrative Law Judge Miller dated March 22, 1985, Docket No. TU-4-40-R. The

decision affirmed the issuance of Notice of Violation (NOV) 84-03-108-13 and found that the Office of Surface Mining Reclamation and Enforcement (OSM) properly exercised jurisdiction over appellant's operations in Rogers County, Oklahoma.

At the hearing held on December 5, 1984, in response to Turner's application for review, counsel for Turner and OSM stipulated the following facts:

> First, Turner Brothers included the Horner property which is the name of the landowner of the property in question within the permit application of permit number 84/87-4112.
>
> Second, Turner Brothers did not obtain the legal right to enter and conduct surface coal mining operations upon the Horner property before the permit was applied for or granted.
>
> Third, Turner Brothers had not entered or conducted surface coal mining operations on the Horner property on the date notice of violation number 84-03-108-13, violation 1 of 3, was issued.
>
> Fourth, Turner Brothers was conducting surface coal mining operations upon other land located within permit number 84/87-4112 upon the date NOV 84-03-108-13, violation 1 of 3, was issued.
>
> Fifth, Turner Brothers was engaged in negotiations with the owner of the Horner property to obtain the legal right to enter and conduct surface coal mining operations upon the property.
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> Sixth, Turner Brothers did not have any ownership rights or claims to the Horner property at the time the permit application was applied for or granted or at any subsequent time.
>
> Seventh, Turner Brothers did not include Mr. Dewey Horner as being a landowner in the permit application list of planned owners who owned property within the permit area of permit number 84/87-4112.
>
> Eighth, Turner Brothers did not obtain from Mr. Horner the legal right to enter the property and conduct surface coal mining operations at any time.

The Administrative Law Judge summarized the hearing testimony as follows:

> Mr. Gregory G. Govier, professional engineer, testified about Violation No. 1. [1/] He explained that the property had been included in the permit based upon a verbal commitment from the property owner during the initial permit preparation stage. He testified that when the property owner decided not to lease to the applicant, the applicant left the property alone. He asserted

1/ Turner was cited for obtaining a permit to mine an area without the right to mine, in violation of 30 CFR 936 and OPRPR § 778.15(a).

that the Oklahoma Department of Mines (ODOM) allowed the applicant to include property under negotiation. Under cross-examination Mr. Govier conceded that ODOM had no written policy in the state program which specifically allowed for inclusion of non-leased property in the permit. He admitted that no reference was made to negotiations in the permit package nor was this land-owner included in the list of property owners otherwise included in the permit package (Tr. 18 & 19).

Mr. Gene M. Robinson, OSM Inspector, testified about Violation No. 2 of the notice of violation. 2/ Subsequent to a citizen's complaint, Inspector Robinson began an investigation of the applicant's blasting practices. He requested seismic records for instances when the weight/distance formula had been exceeded. A company representative informed him that the seismograph tapes for these events had been erased. Inspector Robinson had requested these tapes for the purpose of validating the accuracy of applicant's records. The company records showed compliance with the statute while the monitoring by ODOM showed high readings exceeding the ground vibration limitation of one inch per second.

Mr. Robinson identified documents for introduction into evidence. He identified Respondent's Exhibit No. 1, applicant's blasting record for this site in July 1984. He also identified OSM Inspector Hartings summary notations on the applicant's blasting records for May and June of 1984 as Respondent's Exhibit No. 2. This information was compiled by Inspector Robinson and Inspector Harting at the applicant's Muskogee office. From these documents Inspector Robinson determined that the applicant had exceeded the weight/distance formula on ninety-six occasions, and yet there was no indication of the use of a seismograph in these records. On cross-examination Mr. Robinson stated his conviction that the weight/distance formula is not the conclusive means of determining compliance with the Act, but in his opinion the seismic record is the paramount means of determining compliance.

Michael Rosenthal, OSM engineer, testified about performance standards for blasting. He was qualified as a blasting expert. He testified that he authored pertinent sections of the permanent regulatory program. He defined a complete seismographic record as including the visual wave form on a tape with calibration and range, the names of the persons taking the reading, where the seismograph was placed and located, the names of the person and/or firm doing the analysis and the results of the analysis. He asserted on cross-examination, that this complete record is required by the statute when the weight/distance formula is exceeded.

Decision at 3, 4.

2/ This was a citation for exceeding the blasting limitations in violation of 30 CFR 936, OPRPR § 816.67(a) and OPRPR § 815.65(k).

Appellant argues that OSM had no jurisdiction to issue the NOV or hear this case because OSM allowed only 18 days between the publication date and the effective date of a "rule" providing for Federal takeover of the Oklahoma surface mining regulatory program whereas the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982) requires a hiatus of 30 days. Appellant asserts this "substantive" rule did not fit within any exceptions outlined in that provision of the APA. Therefore, appellant asserts, the Federal takeover of the Oklahoma surface mining regulatory program is void, leaving OSM without authority to issue the NOV and the Office of Hearings and Appeals (OHA) without jurisdiction to hear this case.

Alternatively, appellant argues it complied with Oklahoma Program Regulation (OPRPR) 778.15(a) and all blasting regulations, e.g., OPRPR 816.68. Appellant acknowledges it included properties in its permit application which it did not have a legal right to mine. However, it asserts OSM admitted it did not consider it necessary to have a lease to all lands in a permit application, so long as OSM is aware of the status of the lands included in the application. Appellant states the lack of a lease document in the permit application package constituted notice that appellant had no right to the Horner and Spear properties and that appellant had verbally informed the Oklahoma Department of Mining of the lack of a lease. Appellant asserts that the permitting process often took a year or more, giving rise to an ODOM practice of allowing permit applicants to list land under negotiation in order to avoid incremental permits, and that when negotiations were unsuccessful, the permittee would simply avoid that portion of the permitted area. Appellant asserts both OSM and ODOM had prior knowledge and approved of Turner's permit, implicitly and explicitly, and therefore OSM was estopped from issuing the NOV.

In its answer, OSM contends that, as of April 30, 1984, it had the authority to enforce the Oklahoma regulatory program as a result of proceedings held pursuant to 30 CFR Part 733. OSM claims appellant failed to file a petition for judicial review within the required 60 days of publication of the Federal Register notice announcing the Federal takeover of the Oklahoma program, rendering appellant's current assertions untimely.

As to the NOV, OSM argues that by failing to indicate anywhere in its permit application it was negotiating for the right to mine part of the permit property, appellant violated OPRPR 778.15(a). Further, OSM contends appellant did not delete this property from its permit after it became apparent that negotiations for the right to mine that property would be unsuccessful. OSM avers that oral notification of ODOM employees was not a part of the Oklahoma program. OSM further argues there is no basis for a claim of estoppel.

OSM states appellant failed to maintain a complete and proper seismographic record as required when the weight/distance formula was exceeded. OSM determined appellant had violated OPRPR 816.67(a) because appellant's handwritten records (which indicated 96 excessively strong blasts) did not correlate with OSM readings, and because appellant's records could not be checked against its missing seismographic tapes.

The Oklahoma surface mining regulations specify:

OPRPR § 778.15 Right of entry and operation information.

(a) Each permit application shall contain a description of those documents upon which the applicant bases his legal right to enter and begin surface mining operations in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the documents pertain, and explain the legal rights claimed by the applicant.

(b) Where the private mineral estate to be mined has been severed from the private surface estate, the application shall also provide for lands within the permit area -

(1) A copy of the written consent of the surface owner to the extraction of coal by surface mining methods; or

(2) A copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(3) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under the applicable State law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing shall be construed to authorize the Department to adjudicate property title disputes.

The applicable Oklahoma blasting regulations state:

§ 816.65 Use of explosives: Surface blasting requirements.

* * * * * * *

(k) An equation for determining the maximum weight of explosives that can be detonated within any 8-millisecond period is in Paragraph (1) of this Section. If the blasting is conducted in accordance with this equation, the peak particle velocity shall be deemed to be within the 1-inch-per-second limit.

§ 816.67 Use of explosives: Seismographic measurements.

(a) Where a seismograph is used to monitor the velocity of ground motion and the peak particle velocity limit of 1 inch per second is not exceeded, the equation in Section 816.65(1) need not be used. If that equation is not used by the operator conducting the surface mining activities or exploration over 250 tons, a seismograph record shall be obtained for each shot.

* * * * * * *

(c) The Department may require a seismograph record of any or all blasts and may specify the location at which such measurements are taken.

§ 816.68 Use of explosives: Records of blasting operations.

A record of each blast, including seismograph reports, shall be retained for at least 3 years and shall be available for inspection by the Department and the public on request. The record shall contain the following data:

(a) Name of the operator conducting the blast.

(b) Location, date, and time of blast.

* * * * * * *

(s) Seismographic records, where required, including the calibration signal of the gain setting and --

(1) Seismographic reading, including exact location of seismograph and its distance from the blast;

(2) Name of the person taking the seismograph reading; and

(3) Name of the person and firm analyzing the seismographic record.

[1] We will first address the jurisdictional issue. Appellant asserts OSM had no jurisdiction to issue the NOV and the Department of the Interior is without jurisdiction to hear this case. 3/ Appellant's assertion is based on the APA requirement at 5 U.S.C. § 553(d) which states:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

After public notice and hearing, on April 12, 1984, OSM published in the Federal Register its findings that Oklahoma enforcement of its state

3/ OSM and OHA are separate and independent offices of the Department of the Interior. Administrative Law Judge Miller and the Interior Board of Land Appeals are part of OHA, and hear appeals from actions of OSM pursuant to 43 CFR 4.1120 and 43 CFR 4.1101, respectively.

program was deficient and gave notice that on April 30, 1984, OSM would substitute Federal enforcement for state enforcement of portions of the Oklahoma state regulatory program (i.e., revoke state "primacy") until the deficiencies were corrected. 49 FR 14674 (Apr. 12, 1984).

As Turner points out, there does not appear to be any finding of good cause "published with the rule" which would bring this publication within exception (3) in 5 U.S.C. § 553(d) (1982). Failure of an interested party to petition for issuance, amendments, or repeal of a rule is neither a substitute for nor an alternative to compliance with mandatory prerulemaking notice requirements of the APA. Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3rd Cir. 1972). The APA requires an agency to preface a new regulation with a statement of reasons if it does not intend to comply with the 30-day requirement, e.g., if the requirement is impracticable, unnecessary, or contrary to the public interest. Kelly v. Department of the Interior, 339 F. Supp. 1095 (D.C. Cal. 1972). However, where good cause to dispense with the 30-day notice requirement existed, but was not expressed, it can be deemed to be a forgivable technical violation of the APA. Mader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).

Notwithstanding the argument that the APA had been violated, appellant has not complied with the Surface Mining Control and Reclamation Act of 1977 (SMCRA), provisions providing for the proper avenue of judicial review of the alleged breach of procedural rule making requirements. As Judge Miller stated:

> The applicant has also failed to timely present its objection. 30 U.S.C. § 1276(a)(1) provides that "a petition for review . . . shall be filed . . . within sixty days from the date of such action." The Secretary's notice of decision was issued on April 12, 1984, and was effective as of April 30, 1984. Even accepting the later date as the date of action, the applicant has presented no evidence that it filed a petition for judicial review in any Federal court within the time limit set by the statute. The applicant has therefore waived its right to object to the Secretary's decision by failing to timely object.

Decision at 5.

The State of Oklahoma has unsuccessfully raised the same jurisdictional issue before the U.S. District Court, Western District, Oklahoma. The following statement was made in the Order of the court when dismissing the State's suit:

> The court finds that the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201, contains its own administrative procedure for notification, hearings and the like. These procedures include timeliness, some of which conflict with the provisions and timeliness of the APA. The court finds that the self-contained administrative procedures in SMCRA govern this case, overriding APA. In so doing, the court rejects plaintiffs' contention that every agency action is either rulemaking or an order subject to APA without regard to congressional provision of alternative kinds of administrative governance in

> more specific statutes. The defendants complied in full with the provisions of the SMCRA, specifically with 30 U.S.C. § 1271(b). [Footnote omitted.]

Oklahoma v. Hodel, No. 84-1202-A (Dec. 5, 1985). The SMCRA code provision cited by the court, 30 U.S.C. § 1271(b) (1982), provides:

> (b) Inadequate State enforcement; notice and hearing.
>
> Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith. [Emphasis supplied.]

30 U.S.C. § 1271(b) (1982). In this case there was ample public notice of the impending revocation of state primacy. Turner itself participated in proceedings, giving Turner actual as well as constructive notice of the impending revocation of primacy. The notice OSM published in the Federal Register on April 12, 1984, constituted adequate public notice for the beginning of Federal enforcement pursuant to section 1271(b) of SMCRA.

[2] Appellant also asserts it did not violate the regulations themselves. Clearly, the permitting regulations do not provide for oral addenda. Appellant claims it alerted ODOM employees to the status of the lands in its permit, but appellant does not substantiate that claim. We agree with Judge Miller who stated during the hearing that, without submission of further evidence (which was not forthcoming), he would accord little weight to appellant's claim that its practice was accepted standard procedure in Oklahoma. There is no evidence that appellant made any attempt to reduce the alleged agreement to modify its permit to writing. OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved. (See Tr. 20-21). Any change from an approved permit, no matter how minor, should be documented. Grafton Coal Co., Inc., 2 IBSMA 316, 323, 87 I.D. 521, 525 n.3 (1980). Therefore we conclude appellant was correctly cited for failure to document changes in its permit.

[3] Judge Miller summarized his finding regarding the blasting violation as follows:

> With respect to Violation No. 2 the provisions of OPRPR 816.67(a) require that if the weight/distance formula is not used or followed a seismographic record shall be obtained for each blast. Inspector Robinson determined that the applicant had "not followed the weight distance formula on ninety-six occasions." Engineer Rosenthal testified that a complete record would include a seismographic tape of the wave form with calibration and range as well as the parties involved and the results of their analysis. The applicant countered that its readings had been within the peak particle velocity and therefore the tapes had been erased. Inspector Robinson testified that ODOM had been monitoring the applicant and retained records of seismographic tapes of events in which the peak particle velocity was exceeded. The credible testimony and documents presented as evidence by OSM establish a prima facie case. OSM has carried its burden under 43 CFR § 4.1171(a).
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> Under 43 CFR § 4.1171(b) the ultimate burden of persuasion rests with the applicant for review. The applicant has not presented any evidence to rebut the prima facie case of OSM. The applicant did not present any evidence, by testimony or document, to demonstrate compliance with the blasting regulations. The applicant did not maintain proper and complete blasting records, and did not blast within the weight/distance formula. OSM has presented evidence clearly establishing the violation and this prima facie case has gone rebutted.

Decision at 7.

OSM makes a prima facie case by the submission of sufficient evidence to establish the essential facts of a violation. James Moore, 1 IBSMA 216, 86 I.D. 369 (1979). That was done here and the evidence submitted by OSM not rebutted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Miller is affirmed.

R. W. Mullen
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Franklin D. Arness
Administrative Judge.